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Report of the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies on its sixth session

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies on its sixth session, submitted pursuant to Council resolutions 15/26 and 28/7. The Council, in its resolutions 15/26, 22/33 and 28/7, established and extended until September 2017 the mandate of the open-ended intergovernmental working group. At the end of its sixth session, held from 22 to 24 May 2017, the open-ended intergovernmental working group adopted its conclusions and recommendations, which are contained in section V of the report, for the consideration of the Council at its thirty-sixth session.

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Report of the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies on its sixth session

I. Introduction

1. The Human Rights Council decided, in its resolution 15/26, to establish an open-ended intergovernmental working group with the mandate to consider the possibility of elaborating an international regulatory framework, including, inter alia, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability, taking into consideration the principles, main elements and draft text as proposed by the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. After an initial extension pursuant to resolution 22/3, the Council decided, in its resolution 28/7 of 26 March 2015, to extend the mandate of the open-ended intergovernmental working group for a further period of two and a half years in order for it to undertake and fulfil its mandate.

2. The sixth session, held from 22 to 24 May 2017, was opened by the Chief of the Human Rights Treaties Branch of the Office of the United Nations High Commissioner for Human Rights (OHCHR). He noted that the discussions and work during the past six years had contributed to a greater understanding of the range of complex issues associated with the activities of private military and security companies. The vast amount of information contained in the reports from the previous sessions, and the discussions during the sixth session, would help to develop and shape the conclusions and recommendations to be submitted to the Council at its thirty-sixth session.

3. He referred to the efforts made by the Chair-Rapporteur in order to build consensus among the delegations around certain outstanding issues that had arisen from the previous sessions, including meetings of the regional coordinators and the informal working consultation held on 15 May 2017, which was open to all Member States. Following the consultation, a draft discussion document on elements for an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies (see section III, below) had been shared with all Member States in order to facilitate the discussions during the sixth session. Furthermore, a compilation of recommendations from the previous five sessions of the open-ended intergovernmental working group had been prepared by the Secretariat and was shared with the delegations.[1]

4. From a human rights perspective, he stressed the importance of ensuring that there was no gap in protection from human rights abuses; whenever such abuses were committed by private military and security companies, victims should have access to an effective remedy. Accountability and justice related to the abuses committed by private military and security companies required robust monitoring and reporting, immediate cessation of abuses and establishment of accountability mechanisms. In cases in which human rights abuses occurred, States had the obligation not to let them go unpunished. The lack of accountability for abuses of human rights owing to recourse to private military and security companies, including in complex situations, posed serious concerns. In that context, he recalled the activities carried out by OHCHR, various special procedure mandate holders and the Council referred to in the report of the fifth session (A/HRC/WG.10/5/2). He also highlighted the panel discussion organized in April 2017 by the Working Group on mercenaries, which had focused on the impact of private security companies on the situation of human rights in places of deprivation of liberty. As current trends in various countries indicated that States could increase the practice of offering contracts to private

[1] See www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/OEIWGMilitarySession6.aspx.

security companies to operate prisons and detention facilities, he stressed that that could pose serious risks for human rights. He hoped that the discussions during the sixth session would continue to enhance the human rights perspective on the regulation, monitoring and oversight of the activities of private military and security companies.

II. Organization of the sixth session

A. Election of the Chair-Rapporteur

5. At its first meeting, on 22 May 2017, the open-ended intergovernmental working group elected, by acclamation, the Permanent Representative of South Africa to the United Nations Office and other international organizations at Geneva, Nozipho Joyce Mxakato-Diseko, as its Chair-Rapporteur. The open-ended intergovernmental working group then adopted its agenda (A/HRC/WG.10/6/1) and programme of work.

B. Attendance

6. Representatives of the following States were present at the sixth session: Algeria, Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Colombia, Croatia, Cuba, Ecuador, Egypt, Estonia, Finland, France, Germany, Guatemala, India, Iran (Islamic Republic of), Iraq, Jamaica, Japan, Jordan, Kazakhstan, Kuwait, Malaysia, Morocco, Panama, Peru, Qatar, the Russian Federation, Saudi Arabia, South Africa, Spain, Switzerland, the Syrian Arab Republic, Tunisia, Ukraine, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and Venezuela (Bolivarian Republic of). Representatives of the State of Palestine, the European Union and the International Committee of the Red Cross were also present. Furthermore, representatives of Aspida Risk Management, the Association of World Citizens, Cercle de recherche sur les droits et les devoirs de la personne humaine, the Geneva Centre for the Democratic Control of Armed Forces, Geneva for Human Rights, the International Commission of Jurists and United Villages were present.

C. Introductory remarks of the Chair-Rapporteur

7. In her introductory remarks, the Chair-Rapporteur stressed that the sixth session would be primarily focused on responding to the mandate given to the open-ended intergovernmental working group by the Council. She trusted that, at the end of its sixth session, the open-ended intergovernmental working group would formulate a set of conclusions and recommendations that would address the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies. She requested that all delegations focus their interventions with that aim in mind.

8. In that context, she extended her sincere thanks to the regional coordinators who had engaged with her extensively during the preparatory stage of the sixth session and had provided substantive inputs and contributions in order to develop the draft programme of work. Furthermore, the informal consultation with Member States, held on 15 May 2017, had been another opportunity to engage with delegations directly, which contributed to reducing the differences among delegations in relation to a number of outstanding issues related to private military and security companies. She also referred to the documents that had been circulated by the Secretariat, i.e. a compilation of recommendations from the five previous sessions and a discussion document (see section III, below).

9. The Chair-Rapporteur noted that the issues at hand were complex and multifaceted. Human rights abuses perpetrated by private military and security companies needed to be addressed and there was a need to ensure effective remedies for all victims. The previous sessions had been focused on a range of issues around those topics, and the processes, instruments and regulatory frameworks available at the national and international levels to

address the abuses and provide remedies to victims. The discussions in the previous sessions had also provided an overview of the gaps and areas in which more efforts were required by the international community. In view of that background, the draft programme of work developed for the sixth session consisted of reflections on previous sessions, including areas of convergence and mapping of processes and initiatives, and on challenges and areas in which additional efforts were needed. Furthermore, the sixth session was devoted to drafting conclusions and recommendations by the intergovernmental working group for submission to the Council. She thanked all delegations for their continued active engagement in that process and looked forward to a fruitful sixth session.

III. Discussion document

10. Prior to the start of the sixth session, the Chair-Rapporteur had submitted a discussion document on an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies, which contained the following elements:

1. Definitions and interpretations

(a) Private military and security companies;

(b) Private security companies;

(c) Private military companies;

(d) Complex environments.

2. Objectives of the regulatory framework

(a) To ensure respect for human rights by the private military and security industry operating in complex situations;

(b) To ensure the transparent use of the private military and security industry;

(c) To ensure that the activities carried out by such private military and security companies do not have a negative impact on the rights of individuals.

3. Principles

(a) Effectiveness, namely that the regulatory framework must have a genuine, significant and positive impact on performance, rather than just offering process without substantive change and, to that end, it must be based on third party rather than self-regulation;

(b) Inclusiveness, namely that the regulatory framework must have an impact on the performance of all companies and not just those companies that are already achieving appropriate standards, although perhaps not in a fully measurable and independently verifiable manner;

(c) Transparency through robust, independent processes that address broader concerns about the integrity of voluntary or self-regulatory systems;

(d) Affordability, namely that regulation must be proportionate to operational needs and companies should only have to demonstrate conformity with one accepted and recognized standard.

4. Contracting States

(a) To determine which military/security services States cannot contract out;

(b) To establish a procurement process for private military companies and private security companies that incorporates an assessment of a company's capacity to perform services in accordance with the law, including robust selection criteria;

(c) To incorporate requirements into government contracts to ensure respect for national laws, human rights law and applicable international humanitarian law, including providing relevant guidance;

(d) To monitor and ensure accountability, including by addressing issues of jurisdiction and immunities, for companies operating under a government contract.

5. Territorial States

(a) To ensure that the private security industry within their jurisdiction is effectively controlled and regulated;

(b) To determine which services cannot be carried out by private military companies and private security companies in their territory;

(c) To establish a process to authorize the provision of private military and security services, with robust criteria for licensing;

(d) To monitor private military companies and private security companies that operate on a State's territory.

6. Home States

(a) To determine which military/security services cannot be exported;

(b) To establish a process to authorize the export of military and security services, with robust criteria for licensing;

(c) To regulate the conduct of private military and security companies and personnel;

(d) To monitor and ensure accountability.

7. States of nationality

(a) To determine which military/security services cannot be performed abroad by nationals of the State;

(b) To establish a process to authorize nationals to perform military and security services abroad, including criteria for licensing;

(c) To regulate the conduct of private military and security companies personnel;

(d) To monitor and ensure accountability;

(e) To ensure access to remedies for victims of violations;

(f) To prevent citizens and permanent residents from working for private military and security companies that have not undergone a transparent and fair authorization process administered by a designated regulatory authority.

8. Private military and security companies

(a) To establish and implement compliance mechanisms to ensure that the selection, vetting and training of personnel performing military or security services are in conformity with national and international law;

(b) To establish grievance mechanisms;

(c) To supervise and hold accountable the personnel of private military and security companies who engage in misconduct.

IV. Reflection on previous sessions of the open-ended intergovernmental working group and discussion on the way forward

11. In their general statements at the beginning of the sixth session, delegations expressed their wish to move forward in a spirit of consensus and cooperation. They remarked that the informal consultation held on 15 May 2017, in anticipation of the sixth session, had been useful and had enabled delegations to reduce differences on a number of outstanding issues. Delegations also expressed gratitude for the discussion document that had been circulated after the informal consultation, and for the compilation of recommendations made by the open-ended intergovernmental working group during its previous five sessions.

12. Delegations agreed on the importance of prevention and protection against human rights abuses and highlighted the importance of oversight and accountability in that area. The private military and security companies industry was evolving quickly and a range of obligations existed for States. The private sector wanted legal certainty and victims and human rights defenders needed reliable access to remedies through judicial or non-judicial mechanisms. They emphasized the importance of multi-stakeholder participation in determining the way forward, but agreed that States were the primary decision makers in the context of the open-ended intergovernmental working group. There had been agreement during the previous five sessions regarding the need to improve regulation of private military and security companies and address abuses perpetrated by such companies. Since 2011, States had made progress in analysing and addressing issues related to the operation and regulation of private military and security companies. Progress had also been made in relation to the steps that contracting States, home States, territorial States, and States of nationality should take. States could be mutually supportive by drawing on each other's experiences, guidelines, action plans, good practices, mutual legal assistance programmes and template agreements. They hoped that the sixth session would provide a forum to focus on what the problems were and what strategies were working to address them.

13. Some delegations said that it was key for any new regulatory framework to be based on and complement existing processes, mechanisms, legislation and initiatives, such as the International Code of Conduct for Private Security Service Providers and the International Code of Conduct Association; the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict and the Montreux Document Forum; the Legislative Guidance Tool for States to Regulate Private Military and Security Companies and the Contract Guidance Tool for Private Security prepared by the Geneva Centre for the Democratic Control of Armed Forces; and international standard ISO-18788:2015, which provides a framework for establishing, implementing, operating, monitoring, reviewing, maintaining and improving the management of security operations.[2] They also referred to the Guiding Principles on Business and Human Rights (A/HRC/17/31, annex) and the Accountability and Remedy Project of OHCHR, including the report of the United Nations High Commissioner for Human Rights on improving accountability and access to remedy for victims of business-related human rights abuse (A/HRC/32/19 and Corr.1 and A/HRC/32/19/Add.1).

14. Some delegations were unconvinced of the need for a legally binding instrument and considered that there was no consensus on moving forward on the creation of such an instrument. However, they considered that the development of an international regulatory framework was in the interest of all stakeholders; further work would be needed to determine the form such a framework could take. There was widespread agreement on the need to improve the conduct of private military and security companies and address abuses whenever they occurred. They referred to the consensus on the distinctions between private military companies and private security companies and noted that each of those types of companies raised their own challenges. They urged the open-ended intergovernmental

[2] www.iso.org/standard/63380.html.

working group to be mindful of the distinctions between the two types of companies. They also observed that the open-ended intergovernmental working group could examine national legislation so as to determine best practices and lessons learned.

15. Other delegations called for an international legally binding instrument that regulated the activities of private military and security companies, pursuant to international standards. They stated their concern regarding the current impunity of private military and security companies and referred to certain activities of such companies, for example detaining individuals and engaging in arms trafficking and mercenary behaviour, as the by-products of outsourcing warfare to private entities. They said that private military and security companies were largely able to operate outside the constraints of legal supervision. They recognized the regulatory framework needed strengthening and highlighted legal issues surrounding jurisdiction. They observed that existing tools contained worthwhile pillars for action but were not a complete solution. They stated that in the absence of national legislation, or in the context of insufficient or ineffective legislation, the open-ended intergovernmental working group should draft a document to be submitted to the Council.

16. In the open-ended intergovernmental working group, there was an emerging consensus to work on the basis of the Chair-Rapporteur's discussion document (see section III, above) and an acknowledgement that moving forward on the topic would be an important breakthrough in the work of the open-ended intergovernmental working group. The consensus had led delegations to work together to outline the possible next steps that the open-ended intergovernmental working group could take, which would be presented to the Council at its thirty-sixth session.

17. On 23 May 2017, delegations referred to a document that had been prepared during the first day of the sixth session in relation to which delegations had sought instructions from their Governments. Delegations wanted to agree on a mutually acceptable formulation of words so that the open-ended intergovernmental working group could offer conclusions and recommendations for the Council's consideration. Delegates noted that the work of the open-ended intergovernmental working group was urgent as the end of its mandate was approaching and the Council needed time to consider and discuss the way forward. As agreed by the regional coordinators at their meeting held on 6 April 2017, the sixth session had been scheduled to conclude on 24 May 2017, which meant that the business of the open-ended intergovernmental working group needed to be concluded within three days, rather than five days, as had been the case for previous sessions.

18. Delegations reflected on the need to avoid conflict or a situation of stalemate at that stage, particularly in relation to the different views on the possible legal status of any document that could eventually be proposed by the open-ended intergovernmental working group. The Chair-Rapporteur urged delegations not to pre-empt the outcome of any future deliberations of the open-ended intergovernmental working group and avoid divisions among delegations on the question of whether an international regulatory framework would be legally binding or not. Delegations noted that the open-ended intergovernmental working group had decided, at that point, to freeze discussion of whether to recommend the creation of a legally binding instrument. "Constructive ambiguity" in the recommendations and conclusions was helpful in a context in which delegations held a range of differing views.

19. Delegations initially encountered difficulties in agreeing on a way forward and found the question of including references to existing relevant standards and tools, such as the Montreux Document and the International Code of Conduct, to be challenging. Some delegations held the view that inclusion of those references was essential as those were the only two documents that dealt specifically with private military and security companies. Other delegations said that such inclusion was not necessary as a catch-all paragraph could be drafted to reflect all the standards and tools prepared by the industry and other stakeholders without naming particular standards and tools. They felt uncomfortable referring to specific standards and tools that had not been universally drafted and accepted and were not part of the United Nations process.

20. Noting the divergent views, the Chair-Rapporteur asked for the different formulations to be presented in one document, which was subsequently circulated to the delegations. The Chair-Rapporteur stressed that if consensus could not be reached by the end of the second day of the session then she would put the different formulations to a vote as she felt that that was the most democratic way to proceed. Delegations said they preferred to work towards a consensus text that could be presented to the Council as the recommendations and conclusions of the open-ended intergovernmental working group.

21. After a period of reflection and negotiation on 23 May 2017, delegations were able to propose a consensus text that took into account the different positions that had been articulated. The revised formulation (see section V, below) streamlined the text that had been discussed earlier and resolved the question of how to refer to the relevant stakeholders with relevant expertise who could assist the open-ended intergovernmental working group in its subsequent work.

22. Prior to the adoption of the conclusions and recommendations on 24 May 2017, the representative of Egypt had affirmed the country's commitment to the mandate given to the open-ended intergovernmental working group regarding its commitment to the human rights standards agreed upon in international human rights law. The representative also affirmed the commitment of Egypt to the United Nations and international documents to which it was party and welcomed efforts exerted by delegations to reach consensus on the draft conclusions and recommendations. With a view to supporting those efforts, Egypt decided to go along with the consensus on the proposed text, while reaffirming its understanding that paragraph 28 (b) below was restricted to inviting the Co-Chairs of the Montreux Document Forum to contribute to the discussion on the regulatory framework within the open-ended intergovernmental working group to be established by virtue of the recommendations detailed in section V below and stressing that Egypt was not committed to any document or process to which it was not a party and had not contributed to its preparation. The representative requested that the position of Egypt be reflected in the present report.

23. The representative of India joined the consensus and also supported the process. However, the representative expressed concern over the inclusion of the term "industry" in paragraph 28 (b) of the recommendations, below. The representative suggested that paragraph 28 (b) should finish after the term "relevant expertise", since the rest of the sentence was not necessary. References to the Montreux Document Forum and the International Code of Conduct Association were not acceptable to India because both those references were included within the meaning of the phrase "other stakeholders". The representative requested that the position of India be reflected in the present report and noted that Algeria joined the statement.

24. The representative of Brazil fully joined the consensus around the conclusions and recommendations of the open-ended intergovernmental working group. Private military and security companies did not operate in a legal vacuum and the Montreux Document provided a compilation of relevant international human rights law and international humanitarian law applicable to their work. Nevertheless, it was clear that the absence of a legally binding international instrument imposed greater challenges on monitoring and supervising the activities of private military and security companies, and exposed those living in territorial States to the increased likelihood of human rights abuses. Therefore, Brazil considered that negotiating an international legally binding instrument was not only desirable, but also necessary. Following the constructive suggestion of the Chair-Rapporteur, the open-ended intergovernmental working group had decided to freeze that discussion in order to move forward. Brazil supported that conciliatory and constructive approach and expected that the goodwill to engage in meaningful discussions and negotiations on substantive issues aimed at confidence-building and reaching consensus would last until the open-ended intergovernmental working group concluded its important task. The representative of Brazil expressed confidence that the open-ended intergovernmental working group could move forward and provide all societies with an outcome document that adequately addressed the relevant challenges faced in relation to the regulation of activities performed by private military and security companies.

25. The representative of the International Committee of the Red Cross made a technical remark but did not want to risk jeopardizing the consensus achieved by the delegations. As regards paragraph 27 (b) below, he noted that private military and security companies operated in different circumstances, including in armed conflict. He suggested that reference to international human rights law and international humanitarian law, as applicable, could be included after the term "abuses" in paragraph 27 (b). The Chair-Rapporteur asked if that technical remark could be reflected in the report, rather than reopening negotiation of the conclusions and recommendations, to which the representative of the International Committee of the Red Cross acceded.

V. Conclusions and recommendations

26. On 24 May 2017, the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies adopted the following conclusions and recommendations:

27. The open-ended intergovernmental working group:

(a) Notes the recommendations of the first five sessions of the open-ended intergovernmental working group;

(b) Recognizes the need to protect human rights and ensure accountability for violations and abuses relating to the activities of private military and private security companies;

(c) Acknowledges the difference of views at this time on the nature of an international regulatory framework that would address these concerns;

(d) Notes relevant national, regional and international standards and tools, including those prepared by various stakeholders.

28. The open-ended intergovernmental working group recommends that the Human Rights Council consider the establishment of a new intergovernmental working group for a period of three years mandated to:

(a) Commence elaborating the content of an international regulatory framework, without prejudging the nature thereof, in efforts to protect human rights and ensure accountability for violations and abuses relating to the activities of private military and private security companies, informed by the discussion document on elements for an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies, as prepared by the Chair-Rapporteur, and further inputs from Member States and other stakeholders;

(b) Invite the contributions of Governments, relevant special procedure mandate holders and mechanisms of the Council, treaty bodies, regional groups, intergovernmental organizations, civil society, the industry and other stakeholders with relevant expertise, including the Co-Chairs of the Montreux Document Forum and the International Code of Conduct Association.

29. The open-ended intergovernmental working group also recommends that its conclusions and recommendations be incorporated in a resolution of the Human Rights Council.